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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 161.

THE NATIONAL SAVINGS BANK OF THE DISTRICT OF COLUMBIA ET AL., APPELLANTS,

vs.

JOHN A. J. CRESWELL, ROBERT PURVIS, AND ROBERT H. LEIPOLD, COMMISSIONERS OF THE FREEDMAN'S SAVING AND TRUST COMPANY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED AUGUST 6, 1877.

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1 *Original bill.—Filed Aug.* 21, 1874.

In the supreme court of the District of Columbia.

JOHN A. CRESSWELL, ROBERT PURVIS, AND Robert H. T. Leipold, Commissioners of the Freedman's Saving and Trust Company,
vs.
THE NATIONAL SAVINGS BANK OF THE DISTRICT of Columbia and Alexander Sharp.
} No. 3389. Eq. doc. 13.

The bill of complaint of the above-named complainants shows as follows:

First. The said Freedman's Saving and Trust Company is a corporation organized under and by virtue of an act of Congress approved March 3d, 1865, and the said John A. J. Cresswell, Robert Pur-
2 vis, and Robert H. T. Leipold, a commission duly appointed by virtue of the provisions of the act of Congress approved June 20, 1874, to close the business of the said Freedman's Savings and Trust Company, and they bring this bill in that capacity.

Second. The said defendant, The National Savings Bank of the District of Columbia, is a corporation doing business as a savings bank in the District of Columbia, by virtue of an act of Congress passed for that purpose, and the defendant Alexander Sharp is the marshal of said District.

Third. On the 20th day of June, 1870, the firm of S. P. Brown & Son, composed of Samuel P. Brown and Austin P. Brown, negotiated a loan of $10,000 from the said Freedman's Savings and Trust Company,
3 for which sum said firm made and delivered to said trust company its promissory note, bearing date June 20, 1870, payable to the order of Samuel P. Brown twelve months after date, with interest at the rate of ten per cent. per annum, payable semi-annually, and endorsed by said Samuel P. Brown.

To secure the prompt and certain payment of said note said Samuel P. Brown (and his wife) executed and delivered to the said Freedman's Saving and Trust Company a deed, whereby he conveyed in trust to D. L. Eaton, then the actuary or managing agent of said trust company, the following real property, situated in the county of Washington, District of Columbia, and known as lots numbered seven (7), eight (8), ten (10), twenty-one (21), twenty-two (22), the west half of twenty-
4 nine (29), forty-one (41), forty-eight (48), forty-nine (49), fifty-three (53), sixty (60), sixty-one (61), sixty-six (66), sixty-seven (67), seventy-three (73), seventy-four (74), and seventy-five (75), in S. P. Brown's subdivision of part of Pleasant Plains and Lemon's Outlet, since called Mount Pleasant, as will more fully appear by the said deed, which is herewith filed, marked Exhibit A, and referred to as a part of this bill.

Fourth. Default having been made in the payment of the said note by the said S. P. Brown & Son, the said D. L. Eaton, acting in pursuance of the request of the said Freedman's Saving and Trust Company, and of the powers to him in said deed, made sale of the said property on the 12th day of October, 1872, and that said D. L. Eaton
5 having departed this life before the execution of deeds therefor, John H. Cook was by this court appointed trustee in lieu of said Eaton to complete the execution of the said trusts.

That said property was bid in by one Francis H. Smith, who subsequently assigned his interest to George W. Stickney, and the conveyance was made by said Cook, trustee, to the said Stickney.

Although said conveyance was made to said Stickney absolutely, yet said Stickney was acting for and on behalf of the said Freedman's Savings and Trust Company, and that the purchase was more for the sole benefit of said trust company. Said Stickney was then the actuary and managing agent of the said Freedman's Savings and Trust Company.

6 Fifth. On the 3d day of March, 1870, one John M. Jolly obtained a judgment on the law side of this court in case numbered 6086 for the sum of $\$4{,}694\frac{05}{100}$, with interest and costs, now amounting to more than $\$5{,}000\frac{00}{100}$; that at the time of the said loan to the said S. P. Brown & Son the said judgment constituted a lien upon the said property hereinbefore mentioned, and the same was by misapprehension or mistake overlooked by the then officers of the said Freedman's Savings and Trust Company, and that said judgment still remains apparently a lien of record upon the said property.

Sixth. After the said conveyance by said Cook to said Stickney, and at various times in 1873, the said Freedman's Savings and
7 Trust Company sold for a fair and valuable consideration all of the said property, except a small part thereof, to various persons, residents of the District of Columbia, but before said purchasers would pay the purchase money for the property by them bought, they required the said Freedman's Savings and Trust Company to execute and deliver a bond with two sureties, to save himself, them, and each of them, and their respective heirs and assigns, from the said judgment. And the said Stickney, acting for said trust company, did, with George W. Balloch and Robert I. Fleming as sureties, execute and deliver a bond of indemnity to cover said judgment, costs, and interest, and to save harmless said purchasers.

8 Seventh. Some time about December, 1870, as the complainants are informed and believe, and after the 20th day of June, 1870, the defendant, The National Savings Bank of the District of Columbia, made a loan or loans of a large sum of money (but how much complainants do not know) to the said Samuel P. Brown, or to the firm of S. P. Brown & Son, and to secure the payment thereof took from said Samuel P. Brown a deed of trust, whereby said Brown conveyed to William Stickney and George H. Plant, as complainants believe, in trust for that purpose, with the usual powers of sale, a large quantity of real estate situated in the District of Columbia; that said loan was made by said defendant after the said judgment had become a subsisting lien
9 upon the property thus conveyed to said William Stickney and George H. Plant, and the complainants are informed and believe that said property is still bound by said judgment.

Eighth. As the complainants are informed and believe, the said loan has never been paid to said defendant, the National Savings Bank, and that on or about the 16th day of July, 1874, the said National Savings Bank, in order to protect its security against the effect of said judgment, purchased the same from the said John M. Jolly, and procured the same to be issued to it and entered for its use upon the docket of this court, and thereupon procured to be issued a writ of execution, and caused the same to be levied upon lots 7, 8, 10, 21, 22, west half 29, lots 41, 49, 60, 61, 66, 67, 73, 74, and 75, of the hereinbefore-described prop-
10 erty. That the said Alexander Sharp, marshal of the said District, has advertised the said property so levied upon for sale on

Monday, the 24 day of August, 1874, and threatens to sell the same, and the complainants fear he will sell the same unless restrained by the order of this court; and if such sale should take place the complainants fear that the said Freedman's Savings and Trust Company and the creditors thereof will be irreparably injured.

That the lots so levied upon have all been sold by said trust company as aforesaid, except lots 41, 60, 61, 66, and 67; the residue of said lots so levied upon being still the property of the said trust company.

Ninth. These complainants are unable to cause the title records
11 of the District of Columbia to be searched, in order to be set out fully the real estate conveyed to said William Stickney and George H. Plant as security for said National Savings Bank, because they have not sufficient time before the day of sale, as aforesaid.

Tenth. No part of the said note for $10,000 has been paid by the said S. P. Brown (except interest to December 20, 1871), and that the same remains due and payable, except as reduced by the sales of said real estate.

Eleventh. The complainants allege their willingness and hereby offer to pay their pro rata share of said Freedman's Savings and Trust Company, to relieve the said real estate from the lien of said judgment, which may be found assessable against said trust company upon a proper
12 apportionment, if it shall be so adjudged; but they are advised and believe that said Freedman's Saving Bank is not bound in equity nor in law to contribute anything towards the payment of said judgment

The said complainants therefore pray as follows:

1. That the writ of subpœna of the United States may issue in the usual form directed to the said defendants, the National Savings Bank and Alexander Sharp.

2. That the writ of injunction may issue out of this court, directed to the said defendant, the National Savings Bank and Alexander Sharp, restraining them and each of them perpetually from selling, advertising or offering for sale any of the property hereinbefore described, by
13 virtue of the writ of execution issued upon the said judgment in favor of John M. Jolly and against Samuel P. Brown, or by virtue of any other writ of execution which may hereafter be issued upon said judgment.

3. That the said defendant, National Savings Bank of the District of Columbia, be compelled to discover and disclose by their answer the particular lots or parcels of ground conveyed in trust by S. P. Brown to secure the payment to said Savings Bank of the loan made by it to said Brown, upon which the lien of said judgment operates or has operated since the said loans were made.

4. That the said complainants may have such other and further relief as may be agreeable to equity and good conscience.

JOHN A. J. CRESWELL,
ROBERT PURVIS,
ROBERT H. T. LEIPOLD,
By GEO. W. STICKNEY, *Agent.*

ENOCH TOTTEN,
R. H. T. LEIPOLD,
Sol'rs for Complainants.

14 DISTRICT OF COLUMBIA,
County of Washington, ss:

I, George W. Stickney, being first duly sworn, do depose and on my

oath say that I have been the actuary and managing agent of the Freedman's Savings and Trust Company since about July 1, 1872, and I am now the agent of the above named commissioners, to assist them in closing up the affairs of the said Freedman's Savings and Trust Company. That I have heard read the foregoing bill by me subscribed, and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

GEO. W. STICKNEY.

Subscribed and sworn to before me this 21 day of August, 1874.

R. J. MEIGS, *Clk*,
By R. J. MEIGS, JR., *Ass't Clk*.

15 *Exhibit A to bill.—Filed Aug* 21, 1874.

EXHIBIT A.

DEED OF TRUST.

[Ten dollars internal-revenue stamp.]

This indenture, made this twentieth day of June, in the year of our Lord one thousand eight hundred and seventy, between Samuel P. Brown and Harriet E. Brown, his wife, of the city and county of Washington, in the District of Columbia, parties of the first part, and D. L. Eaton, of the same place, party of the second part.

Whereas Samuel P. Brown and Austin P. Brown, trading under the name and firm of S. P. Brown & Son, are justly and truly indebted unto Samuel P. Brown in the sum of ten thousand (10,000) dollars, current money of the United States, for which amount he holds their promissory note of equal date with these presents, and payable
16 twelve (12) months after date, with interest at the rate of ten (10) per cent. per annum;

And whereas the said parties of the first part are desirous to secure the full and punctual payment of said note, together with all interest, cost, and expenses that may accrue thereon, according to the true intent and meaning of the same:

Now, therefore, this indenture witnesseth, that the said parties of the first part, for and in consideration of the premises aforesaid, and further, the sum of one dollar, in lawful money of the United States, to them in hand paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed,
17 released, and conveyed, and do by these presents grant, bargain, sell, alien, enfeoff, release, and convey unto the said party of the second part, his heirs and assigns, all those certain pieces or parcels of ground, situate in the county of Washington aforesaid, and known and described as lots numbered seven (7), eight (8), ten (10), twenty-one (21), twenty-two (22), west half twenty-nine (29), forty-one (41), forty-eight (48), forty-nine (49), fifty-three (53), sixty (60), sixty-one (61), sixty-six (66), sixty-seven (67), seventy-three (73), seventy-four (74), and seventy-five (75), in S. P. Brown's subdivision of part of Pleasant Plains and Lemon's Outlet, since called Mount Pleasant.

Together with all the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in any wise
18 appertaining, and all the estate, right, title, interest, and claim,

either at law or in equity, or otherwise however, of the said party of the first part, of, in, to, or out of the said pieces or parcels of ground and premises.

To have and to hold the said pieces or parcels of ground and premises and appurtenances unto and to the use of the said party of the second part, his heirs and assigns, in and upon the trusts, nevertheless, hereinafter mentioned and declared, that is, in trust to permit the said S. P. Brown, his heirs or assigns, to use and occupy the said described premises and the rents, issues, and profits thereof, to take, have, and apply to and for his or their sole use and benefit, until default be made in the payment of said note or any proper cost, charge,
19 commission, half commission or expense in and about the same.

And upon the full payment of all of said note and the interest thereon, and all other proper costs, charges, commissions, half commissions, and expenses at any time before the sale hereinafter provided for, to release and reconvey the said described premises unto the said S. P. Brown, his heirs or assigns, at his or their cost.

And upon this further trust, that upon default being made in the payment of the said note, or any proper cost, charge, commission, half commission or expense in and about the same, then and at any time thereafter to sell the said pieces or parcels of ground and premises at public auction, upon such terms and conditions, and at such time and
20 place, and after such previous public advertisement, as the said party of the second part or his heirs or the trustee acting in the execution of this trust shall deem advantageous and proper; and to convey the same in fee-simple to, and at the cost of, the purchaser or purchasers thereof, who shall not be required to see to the application of the purchase money; and of the proceeds of said sale or sales, first to pay all proper costs, charges or expenses, and to retain as compensation a commission of five per cent. on the amount of the said sale or sales; secondly, to pay whatever may then remain unpaid of the said note and the interest thereon, whether the same shall be due or not; and, lastly, to pay the remainder, if any, to said S. P. Brown, his
21 executors, administrators or assigns.

In testimony whereof the said part of the first part ha hereunto set hand and seal on the day and year first hereinbefore written.

S. P. BROWN. [SEAL.]
HARRIET E. BROWN. [SEAL.]

Signed, sealed, and delivered in the presence of—

N. CALLAN.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Nicholas Callan, a notary public in and for the county aforesaid, in the said District, do hereby certify that S. P. Brown and Harriet E. Brown, his wife, party to a certain deed, bearing date on the twentieth day of June, A. D. 1870, and hereto annexed, personally appeared
22 before me in the county aforesaid, the said S. P. Brown and Harriet E. Brown, his wife, being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed; and the said Harriet E. Brown being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and

deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and notarial seal this twentieth day of June, A. D. 1870.

[SEAL.]

N. CALLAN,
Notary Public.

Subpœna to ans. bill.

23 In the supreme court of the District of Columbia, August 21st' 1874.

JOHN A. J. CRESSWELL ET AL., COMPLAINANTS,
vs.
THE NATIONAL SAVINGS BANK ET AL., DEFENDANTS. } No. 3889. Equity docket, 13.

The President of the United States to the National Savings Bank of the District of Columbia and Alexander Sharp, defendants:

You are hereby commanded to appear in this court, at its first special term, occurring twenty days after service of this subpœna, and answer the exigency of the original bill, under pain of attachment, and such other process of contempt as the court shall award.

Witness D. K. Cartter, chief justice.

[SEAL.]

R. J. MEIGS,
Clerk, &c.,
By R. J. MEIGS, JR.,
Ass't Clerk.

24 *Injunction.—Restraining order.*

An original bill praying an injunction to restrain the defendants from selling, offering for sale, or advertising for sale the property therein mentioned, is fixed for the 16th of September, 1874, at 11 o'clock a. m.

Until further order you are hereby restrained as prayed.

By order of the court.

A. B. OLIN,
Justice, &c.

Marshal's return.

Som'd and served notice for inj't on the National Savings Bank D. C. Aug't 25, '74.

A. SHARP,
Marshal.

Service acknowledged of summons and notice for injt. Aug't 24, '74.

ALEX. SHARP,
Marshal.

25 *Answer filed.*

In the supreme court of the District of Columbia.

JOHN A. J. CRESSWELL ET AL.
vs.
THE NATIONAL SAVINGS BANK OF THE DISTRICT of Columbia. } No. 3889. Eq. doc. 13.

Answer of the National Savings Bank.

The respondent says:

1. It admits the averments of paragraph No. 1 of the bill.

2. It admits the averments of paragraph No. 2 of the bill.

3. It admits the averments of paragraph No. 3 of the bill.

4. It presumes the facts stated in paragraph No. 4 to be correctly set forth, and therefore admits them.

5. It admits that John M. Jolly had obtained a judgment against S. P. Brown, as set forth in paragraph No. 5, and that the same
26 was and constituted a lien on the property conveyed to secure the debt to said Freedman's Savings and Trust Company, as alleged, but cannot admit that such judgment was overlooked through mistake by the officers of said company at the time of taking said deed of trust, or that they had not notice of the same, and, if it shall be material, it requires proof of such want of notice.

6. Defendant does not doubt, and therefore admits it to be true as alleged, that said Freedman's Savings and Trust Company did sell most of said property, from time to time, to various persons, and did execute a bond of indemnity, as alleged, to secure them against said judgment. But defendant insists, as to the property so sold and con-
27 veyed, the complainants have no interest which entitles them to relief or to any standing in a court of equity, and that the said bill of complaint is defective in that it fails to make parties in this suit of the purchasers of said property.

7. The defendants made various loans to said Samuel P. Brown of various sums of money, and to secure the payment thereof took from him several deeds of trust conveying a large quantity of real estate, and said loans were made after said judgment had become a subsisting lien on said property. Defendant herewith files a list of said deeds, marked Defendant's Exhibit A, containing a description of the several pieces of property covered by them, and avers that said deeds were taken without actual notice of the existence of said judgment.

28 8. The said loan was never repaid to said defendant, and it is true that, after discovering the existence of said judgment, the defendant did purchase and procure to be assigned to it the said judgment in order to protect its said security, and has caused an execution to be issued and levied upon the property described in the bill (Par. No. 8), and that the same was advertised for sale by the marshal of the District, as alleged.

9. The copy of said deed of trust, given to secure defendant's deed, herewith exhibited, will show the property thereby conveyed.

10. The defendant cannot admit that it is not entitled to collect its said judgment by sale of any part of the property subject to the lien thereof, but on the contrary claims the right so to do; but if
29 the said complainants are entitled to be relieved from any part thereof to contribute to its discharge, then the defendant submits that all the property affected by said lien of said judgment, and require other property affected by the lien must contribute rateably according to value to its satisfaction, and said bill of complaint does not show and aver that the property described and conveyed to secure the respective debts due said Freedman's Savings and Trust Company and to this defendant was the whole of the property subject to said lien, and defendant prays the same benefit of this objection to said bill as if the same were formally set forth by way of demurrer.

30 And the defendant is informed and believes that there was a

considerable amount of other property than that described in the bill which was owned by said Brown subject to the lien of said judgment, and which was sold and conveyed by him after his said conveyance in trust to secure the debt to this defendant, and no such relief as complainants pray could be had without making the purchasers of said property parties to this suit, in order that said property may be charged with its pro-rata share of said judgment.

And defendant, having fully answered, prays to be hence dismissed with its reasonable costs, &c.

WALTER S. COX,
Solicitor.

[SEAL OF THE BANK.] LEWIS CLEPHANE,
Vice-President and Acting President of National Savings Bank.

31 *Exhibit A to answer.*

EXHIBIT A.

Loans made to S. P. Brown and S. P. Brown & Son by the Nationa Savings Bank of the District of Columbia.

Loan of June 26th, 1871, for years, $3,700, secured by deed of trust dated June 26, 1871, and duly recorded in liber No. 656, folio 231, on parts of lots 16 and 20 in S. P. Brown's second subdivision of Pleasant Plains and Lemon's Outlet, said pieces fronting on the east side of the old Piney Branch road and opposite S. P. Brown's homestead, beginning for said pieces at the southwest corner of said lot nineteen (19) and running thence eastwardly with the line of Sheridan avenue one hundred and sixty four and five-tenths (164 5-10) feet to a ten-foot alley; thence northerly with the line of said alley one hundred and ten
32 (110) feet; thence westwardly parallel with Sheridan avenue to old Piney Branch road; thence southerly with said road to the place of beginning.

Loan of July 24th, 1871, for years, , secured by deed of trust dated July 24, 1871, and duly recorded in liber 657, folio 28, on part of lot numbered one (1), and the whole of lot numbered two (2), in Samuel P. Brown's subdivision of Pleasant Plains and Lemon's Outlet; said lots fronting on 14th road and Linnean Hill or Pierce Mill road, the same containing twenty-eight thousand (28,000) square feet, more or less.

Loan of August 7th, 1871, for years, $3,700, secured by deed of trust dated August 7th, 1871, and duly recorded in liber No. 655, folio 231, on the part or west half of lot numbered eighty-five (85), in Samuel P. Brown's subdivision of Pleasant Plains and Lemon's Out-
33 let, beginning at the center of said lot numbered eighty-five (85), on the north line of Laurel avenue; thence westerly one hundred and twenty (120) feet to the west line of lot numbered sixty-five (65); thence north seventy-five (75) feet by and with said line; thence east one hundred and twenty (120) feet to the center of said lot eighty-five (85) feet, and thence southerly seventy-five (75) feet to the beginning; together with the improvements, consisting of a three-story French roof frame dwelling, frame stable, &c.

Loan of September 25th, 1871, for years, $7,000, secured by a deed of trust dated September 25th, 1871, and duly recorded in liber 661, folio 50, on all that certain piece or parcel of ground, being part of original lot numbered twenty-six (26), in square numbered two
34 hundred and fifty-two, according to the plan of said city, and

bounded as follows, viz: Commencing at a point on Thirteenth (13th) street west one hundred and fifty-one (151) feet and four (4) inches from G street north, and running thence along said Thirteenth (13th) street northwardly eighteen (18) feet and eleven (11) inches; thence west, parallel with said G st., one hundred and four (104) feet; thence south parallel with said Thirteenth (13th) street, eighteen (18) feet and eleven (11) inches; thence east, parallel with said G street, one hundred and four (104) feet to the place of beginning; to gether with the improvements, as above.

Loan of March 11, 1872, for 2 years, $5,000, secured by deed of trust dated March 11th, 1872, and duly recorded in liber No. 678, folio 75, on all those lots numbered forty-four (44), forty-five (45), forty-six (46), sixty-eight (68), sixty-nine (69), seventy (70), seventy-one (71),
35 seventy-two (72), seventy-nine (79), seventy-seven (77), seventy-eight (78), eighty (80), eighty-one (81), eighty-two (82), eighty-three (83), fifty-eight (58), and fifty-nine (59), of S. P. Brown's subdivision of Mount Pleasant.

Loan of April 23d, 1872, for two years, $2,500, secured by deed of trust dated April 23, 1872, and duly recorded in liber No. 680, folio 312, on parts of lots numbered fifty-five (55), fifty-six (56), and fifty-seven (57), of S. P. Brown's subdivision of Mount Pleasant, commencing at a point on the south end of lot fifty-five (55), ten (10) feet from the southwest corner of said lot, and thence north, parallel with the west line of said lot fifty-five (55), two hundred and seventy (270) feet; thence par-
allel with the south line of lots fifty-five (55), fifty-six (56), and fifty-
36 seven (57), one hundred (100) feet; thence south, parallel with the west line of lot fifty-seven (57), two hundred and seventy (270) feet to a point on the south end of lot fifty-seven (57), ten (10) feet east of the southwest corner of said lot fifty-seven (57); thence east along the south line of lots fifty-seven (57), fifty-six (56), and fifty-five (55), to the place of beginning; containing twenty-seven thousand (27,000) square feet of ground, together with the improvements, as above.

Loan of April 24, 1872, for two years, $3,700, secured by deed of trust dated April 24, 1872, and duly recorded in liber No. 680, folio 245, on parts of lots numbered fifty-six (56), fifty-seven (57), and eighty-five (85) of S. P. Brown's subdivision of Mount Pleasant, being all that portion of said lots not heretofore conveyed to us; also all of lots fifty-nine and one-half (59½), sixty-two (62), seventy-six (76), and eighty-four of said S. P. Brown's subdivision of Mount Pleasant, containing in all one hundred thousand five hundred and seventy-four (100,574) feet of ground.

37 *Amended bill.—Filed Feb.* 3, 1875.

In the supreme court of the District of Columbia.

JOHN A. J. CRESSWELL AND OTHERS
vs.
THE NATIONAL SAVINGS BANK. } No. 3889. Eq. doc.

The same complainants, by way of amendment to their original bill, say as follows:

That of the lots mentioned in the original bill the following have been sold; that is to say, lots 7 and 8 and 10 have been sold by the said Freedman's Savings and Trust Company to John B. Bloss and A. L. Sturtevant; lots 21 and 22 have been sold to Maria Robbins; the west

half of lot 29 has been sold to Charles P. Pushaw and James F. Medberry; and lots 48 and 49 and 71, 72 and 73 have been sold to E. N. Houghton; the remaining lots are still in the name of George
38 W. Stickney, who holds the same in trust for the benefit of the said Freedman's Savings Bank.

The complainants therefore pray, in addition to the prayers contained in the original bill, that the said John B. Bloss, A. L. Sturtevant, Maria Robbins, Charles P. Pushaw, James F. Medberry, E. N. Houghton and George W. Stickney may be made parties to this cause, and that a subpœna may issue in the usual form to each of them.

The complainants also pray such other and general relief as they may be entitled to have in the premises.

JOHN A. J. CRESSWELL.
ROBERT PURVIS.
R. H. T. LEIPOLD.

ENOCH TOTTEN.
Sol. for Plf's.

39 *Answer of John B. Bloss & A. L. Sturtevant to amended bill.—Filed Feb.* 5, 1875.

In the supreme court of the District of Columbia.

JOHN A. J. CRESSWELL ET AL.
vs.
THE NATIONAL SAVINGS BANK ET AL. } No. 3889. Eq. doc. 13.

The joint and several answer of John B. Bloss and A. L. Sturtevant to the original and amended bill in this cause respectfully shows that they admit that they have purchased lots 7, 8, and 10, as alleged in the amended bill, and that they believe the allegations in the said original bill to be true.

A. L. STURTEVANT.
JNO. B. BLOSS.

DISTRICT OF COLUMBIA,
County of Washington, ss:

We, A. L. Sturtevant and John B. Bloss, being first duly sworn, do depose and say that I have read the foregoing answer by me
40 subscribed, and the facts therein stated of my personal knowledge I know to be true, and those stated on information and belief I believe to be true.

A. L. STURTEVANT.
JNO. B. BLOSS.

Subscribed and sworn to before me this 30th day of January, 1875.
[SEAL.] JNO. H COOK,
Notary Public.

Answer of Maria Robbins.—Filed Feb. 5, 1875.

In the supreme court of the District of Columbia.

JOHN A. J. CRESSWELL ET AL.
vs.
THE NATIONAL SAVINGS BANK ET AL. } No. 3889. Eq. doc. 13.

The joint and several answer of Maria Robbins to the original bill

and amended bill in this cause respectfully shows, that she ad-
41 mits that she purchased lots 21 and 22 as alleged in the amended bill, and she believes the allegations in said original bill to be true.

MARIA ROBBINS.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, , being first duly sworn, do depose and say that I have read the foregoing answer by me subscribed, and the facts therein stated on my personal knowledge are true, and those stated on information and belief, I believe to be true.

MARIA ROBBINS.

Subscribed and sworn to before me this 26th day of January, 1875.
[SEAL.] CHAS. H. MOULTON,
Notary Public.

42 *Answer of Pushaw & Medberry.—Filed Feb.* 5, 1875.

In the supreme court of the District of Columbia.

JOHN A. J. CRESSWELL ET AL.
vs.
THE NATIONAL SAVINGS BANK ET AL. } No. 3889. Eq. doc. 13.

The joint and several answer of Charles P. Pushaw and James F. Medberry to the original bill and amended bill respectfully shows, that they purchased the west half of lot 29, as alleged in the amended bill, and they believe the allegations in said original bill to be true.

J. F. MEDBERY.
CHAS. P. PUSHAW.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, , being first duly sworn, do depose and say
43 that I have read the foregoing answer by me subscribed, and the facts therein stated on my personal knowledge are true, and those stated on information and belief I believe to be true.

CHAS. P. PUSHAW.
J. F. MEDBERY.

Subscribed and sworn to before me this 28th day of January, 1875.
[SEAL.] J. T. CALDWELL,
Notary Public.

Answer of Houghton.—Filed Feb. 5, 1875.

In the supreme court of the District of Columbia.

JOHN A. J. CRESSWELL ET AL.
vs.
THE NATIONAL SAVINGS BANK ET AL. } No. 3889. Eq. doc. 13.

The joint and several answer E. N. Houghton to the original bill and amended bill in this cause respectfully shows that he admits

44 that he has purchased lots 48 and 49, and 71, 72, and 73, as alleged in the amended bill, and he believes the allegations in said original bill to be true.

E. N. HOUGHTON.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, E. N. Houghton, being first duly sworn, do depose and on my oath say, that I have read the foregoing answer by me subscribed, and the facts therein stated of my personal knowledge I know to be true, and those stated on information and belief I believe to be true.

E. N. HOUGHTON.

Subscribed and sworn to before me this 30th day of January, 1875.
[SEAL.] WILLIAM J. WILSON, *J. P.*

45 *Answer of Stickney.—Filed Feb.* 5, 1875.

In the supreme court of the District of Columbia.

CRESSWELL ET AL.
vs.
NAT'L SAVINGS BANK ET AL. } No. 3889. Eq. doc. 13.

Separate answer of George W. Stickney to the bill and amended bill in the above cause.

George W. Stickney, for answer to the allegations contained in the bill and amended bill in the above cause, says that he admits the truth of the same.

GEO. W. STICKNEY.

Subscribed and sworn to before me this 3 day of Feb'y, 1875.
R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Ass't Clerk.

46 *Replication.—Filed Feb.* 26, 1875.

In the supreme court of the District of Columbia.

CRESSWELL ET AL.
vs.
NAT'L SAVINGS BANK ET AL. } No. 3889. Eq. doc. 13.

The said plaintiffs join issue with defendants, Stickney, Houghton, Pushaw, Medbery, Robbins, Bloss, and Sturtevant, on their answers.

ENOCH TOTTEN,
Sol'r for Pl'ffs.

Stipulation as to hearing and issue.—Filed Mar. 2, 1875.

In the supreme court of the District of Columbia.

FREEDMAN'S SAVINGS AND TRUST CO., comm's of,
vs.
NATIONAL SAVINGS BANK ET AL. } No. 3889. Eq. doc. 13.

It is hereby stipulated that the above-entitled cause may be

47 placed upon the trial calender for March, 1875, and that the cause may be heard on the pleadings and exhibits in the cause. Also, that the cause shall be deemed at issue without an answer to the amended bill by the said savings bank.

Feb'y 26th, '75.

ENOCH TOTTEN,
For Com'rs.
W. S. COX,
For Def't, Nat'l Savings Bank.

Decree and injunction.—Filed May 4, 1875.

In the supreme court of the District of Columbia.

JOHN A. J. CRESSWELL & OTHERS, COM'RS Freedman's Savings and Trust Company, *vs.* THE NATIONAL SAVINGS BANK AND ALEXANDER Sharp. } No. 3889. Equity doc., 13.

48 This cause having come on to be heard on the pleadings and exhibits in the cause, and having been argued by counsel, it is this 4 day of May, 1875, ordered, adjudged, and decreed that said complainants are entitled to have all the real estate belonging to said Samuel P. Brown on the 20th day of June, 1870, bound by the judgment at law in favor of John M. Jolly, sold in the inverse order of its alienation by said Brown, including the property sold and conveyed by said Brown for the security of the defendant, the National Savings Bank, before the lands conveyed for the security of the Freedman's Savings and Trust Company, as set forth in said bill of complaint, can be called upon to contribute to the payment of any part of said judgment.

49 It is further ordered, adjudged, and decreed that the said defendants, Alexander Sharp, The National Savings Bank, and its officers, agents, and attorneys, be, and each of them is hereby, restrained, enjoined, and prohibited from in anywise interfering with any of the property mentioned and described in the said bill of complaint for the purpose of collecting or satisfying the said judgment, or any part of it, until all the other real estate belonging to the said Samuel P. Brown on said 20 day of June, 1870, bound by said judgment, shall have been sold, and the proceeds of such sale or sales applied to the payment of the said judgment, and until the further order of this court, and that complainants recover the costs of this suit, to be taxed by the clerk.

By the court.

A. B. OLIN,
Justice, &c.

50 *Appeal to gen'l term.*

In the supreme court of the District of Columbia.

CRESSWELL ET AL. *vs.* THE NATIONAL SAVINGS BANK ET AL. } No. 3889. Eq. doc., 13.

The clerk will please enter an appeal to the general term in this case.

WALTER S. COX,
Sol'r for Def'ts.

Appeal entered as prayed.
By the court.

Decree in gen'l term.

In the supreme court of the District of Columbia.

CRESSWELL ET AL.
vs.
THE NATIONAL SAVINGS BANK ET AL. } No. 3889. Eq. doc., 13.

51 This cause came on to be heard at a former day of the present term upon the record of the special term, and was argued by counsel on both sides; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the decree of the said special term of the 4th day of May, 1875, from which the appeal to this court was prosecuted, be, and the same is hereby, affirmed with costs.

And the court remands the case to the special term to the end that said decree be carried into execution by such further order in the cause as may be necessary, if any.

By the court.

Appeal to the Sup. Court of the U. S.

The defendants, by their solicitor, pray an appeal to the Supreme Court from the decree herein at the present term of the court, and the same is allowed.

52 *Appeal bond to Sup. Court of the U. S.—Filed Feb.* 12, 1876.

In the supreme court of the District of Columbia, the 10th day of February, 1876.

COMMISSIONERS OF THE FREEDMAN'S SAVING and Trust Company
vs.
THE NATIONAL SAVINGS BANK OF THE District of Columbia. } No. 3889. Equity doc., 13. Appeal.

Know all men by these presents that we, William Stickney and Benjamin B. Snyder, are bound unto the above-named complainants in the sum of five hundred dollars, to be paid to the said complainants and their successors; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents,

53 sealed with our seals, and dated this day of , 18 .

Whereas the above-named defendant hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named defendant shall prosecute its said appeal to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WILLIAM STICKNEY. [SEAL.]
B. P. SNYDER. [SEAL.]

Sealed and delivered in presence of—
WM. TAYLOE SNYDER.

Feb. 12, 1876. Approved.

MACARTHUR, *Justice.*

Clerk's certificate.

CLERK'S OFFICE,
Supreme Court of the District of Columbia:

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand seal and the seal of said court this 18th day of November, 1876.

[SEAL.]

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Assistant Clerk.

(Indorsement on cover:) No. 161. The National Savings Bank of the District of Columbia et al., appellants, vs. John A. J. Creswell, Robert Purvis, and Robert H. T. Leipold, commissioners of the Freedman's Savings and Trust Company. District of Columbia sup. court. Filed 6th August, 1877.

Supreme Court of the United States.

OCTOBER TERM, 1879.

COMMISSIONERS OF THE FREEDMEN'S SAVINGS AND TRUST COMPANY

vs.

THE NATIONAL SAVING BANK ET AL.

No. 161.

Statement and brief for Defendant and Appellant, the National Savings Bank.

HANNA & JOHNSTON,
Sol'rs for Appellant, the Nat'l Savings Bank.

R. O. POLKINHORN, Printer.

Supreme Court of the United States.

OCTOBER TERM, 1879.

COMMISSIONERS OF THE FREEDMEN'S SAVINGS AND TRUST COMPANY

vs.

THE NATIONAL SAVING BANK ET AL.

No. 161.

Statement and brief for Defendant and Appellant, the National Savings Bank.

HANNA & JOHNSTON,
Sol'rs for Appellant, the Nat'l Savings Bank.

R. O. POLKINHORN, Printer.

Supreme Court of the United States.

OCTOBER TERM, 1879.

COMMISSIONERS OF THE FREEDMEN'S SAVINGS AND TRUST COMPANY

vs.

THE NATIONAL SAVING BANK ET AL. } No. 161.

Statement and brief for Defendant and Appellant, the National Savings Bank.

It will appear from the Record in this cause that on the 3d day of March, 1870, one John M. Jolly obtained judgment in the Supreme Court of the District of Columbia against one Samuel P. Brown for $4,694.05, with interest and costs. On the same day the judgment was duly recorded and became a lien on all the unincumbered real estate belonging to Brown, a portion of which is mentioned in the bill of complaint.

This judgment is now owned by the National Savings Bank by virtue of an assignment, for full value, from Jolly.

The bill alleges that the firm of S. P. Brown & Son, of which the said Samuel P. Brown was the senior member, borrowed $10,000 from complainant; that for this amount the firm of S. P. Brown & Son gave its promissory note

dated June 20, 1870, and payable twelve months after date, with interest at ten per centum per annum; that this loan was secured by deed of trust to D. L. Eaton, actuary of the Freedmen's Savings and Trust Company, and the original deed of trust is filed, as an exhibit, with the bill of complaint; that, subsequently, on October 12, 1872, said Eaton sold the property embraced in said deed of trust, under the power of sale contained therein, and that at this sale complainant became the purchaser.

The Record further shows that at various dates between June 26, 1871, and April 24, 1872, the appellant loaned several sums of money to S. P. Brown, and S. P. Brown & Son, and obtained as security for said loans deeds of trust on different parcels of land situated in the city or county of Washington. (Rec. 8, 9.) These loans have not been repaid.

The National Savings Bank, as owner by assignment, from Jolly, of the judgment referred to, directed the U. S. Marshal to sieze by writ of *fieri facias* certain of the lots now claimed by the Freedmen's Savings and Trust Company, and by purchasers from that Company. This bill was thereupon filed to enjoin a sale under this levy.

The ground of the application for the injunction is that the parcels of property conveyed by Brown are liable in the inverse order of their alienation to the lien of the judgment referred to; and that, inasmuch as the property claimed by complainant was conveyed by Brown before that which was transferred by him to secure the National Savings Bank, the former cannot be subjected to said execution sale until the latter is exhausted.

The court below allowed the injunction as prayed, and the National Savings Bank appealed to this court.

It is contended that the court below erred in not dismissing the complainant's bill.

Brief of Argument.

I.

The rule which is invoked by complainant declares that, where several parcels of land, bound by a common charge, are conveyed by warranty deed to different purchasers and at different times, such parcels are charged with the paramount lien in the inverse order of their alienation, *provided* the junior purchasers have notice of the paramount lien and of the prior conveyances of portions of the land bound by it.

We do not understand the appellee to claim that this rule has ever been previously adopted by the Supreme Court of the District of Columbia. It is believed that that court has not been called upon to consider the question until this case arose.

The Supreme Court of the United States has, on the contrary, recognized, on at least one occasion, the opposing rule viz: that, in marshalling real securities bound by a common charge, each piece of the encumbered property should bear its share of the burden, in the proportion which the value of such parcel bears to the whole encumbrance, and irrespective of the order in which the several parcels may have been conveyed.

Hughes vs. *Edwards*, 9 Wheat., 501.

It is hardly necessary to add that the decisions of the Supreme Court of the United States on general questions are conclusive on the Supreme Court of the District of Columbia. Wherefore, it is submitted that the rule expressed in *Hughes* vs. *Edwards* constitutes a rule of property in the District of Columbia, and is conclusive in the case at bar.

The propriety of charging the paramount encumbrance on the parcels of land in the inverse order of their alienation, was considered in *Orvis* vs. *Powell*, 98 U. S. 176, but

in that case the court followed the local rule in force in Illinois, and declined to assert that the rule relied on by complainant existed as a general principle in Courts of Equity.

An examination of the authorities will show that they are not harmonious. In the following cases what is known as the *pro rata* rule has been adopted and acted upon.

Barnes vs. *Rackster*, 1 Young & Coll. N. R., 401;

1 Hillard Mort. 310., (citing Bacon's Abr. Title Execution B 4; *Carter* vs. *Bernardiston*, 2 Eq. Cas. Abr., 224; Sir W. Herbert's case, 3 Coxe 14; *Harris* vs. *Ingleden*, 3 P. Williams, 98, 99;)

Averall vs. *Wade*, 2 Lloyd & Goold, 252, Story Equity § § 477, 484, 1,233 (b.); Adams Equity 270; (citing 2 Porter 262; 2 Rand. 384; 4 Rand. 272; 3 J. J. Marsh. 44; 4 Monroe, 76, 2 Ed. C. R., 297;)

Green vs. *Ramage*, 18 Ohio, (Griswold) 429;

Burke vs. *Chrisman*, 3 B. Monroe, 50;

Bevely vs. *Brooks*, 3 Leigh, 426; 2 Humphries, 34;

Massie vs. *Wilson*, 16 Iowa, 391;

Barney vs. *Myers*, 28 Iowa, 472;

Dickey vs. *Thompson*, 8 B., Monroe, 313.

If the *pro rata* distribution of the common charge is the proper mode, the decree of the Court below is certainly erroneous—in that it directs the property mentioned in the pleadings to be sold in the inverse order of its alienation by Brown.

If this was the only error in the decree, it might be modified by directing the Jolly judgment to be paid *pro rata* from the several parcels of land mentioned in the bill. It will be observed, however, that appellant sets up, in its answer, that the owners of the other property, formerly owned by Brown, are necessary parties, inasmuch as their property must bear its share of the common burden. Notwithstanding that the point is made in appellant's answer of the non-joinder of defendants, whose presence is of interest to it,

the complainant did not amend. The bill should, therefore, be now dismissed.

Shields vs. *Barrow*, 17 How., 145.

II.

A.

In discussing the propriety of adopting the general rule as to marshalling, as desired by complainant, it was assumed, for the time, that complainant's bill contained all the allegations necessary to enable the Court, in this particular case, to charge the lien on the parcels of land in the inverse order of their alienation, if the Court should be of opinion that that mode is to be preferred to the *pro rata* distribution of the burden.

An inspection of the record will show, however, that complainant has omitted one allegation which is an essential element of his case. The allegation referred to is one to the effect that appellant had, when the conveyance under which it claims was made by Brown, actual knowledge or constructive notice of the prior conveyance to complainant of some of the lots on which the judgment was a lien.

If a vendee should purchase one of several lots, known by him to be bound by a common charge, he has a right to presume, until he is otherwise informed from some source, that the remainder of the property is still vested in his vendor.

Vol. 2, W. & T. Ld. Cases, Eq. pt., 1, p. 298;
Brown vs. *Simmons*, 44 N. H., 475, 479;
Chase vs. *Woodbury*, 6 Cushing, 143.

In the absence of such notice, he has a right to infer that the land so purchased is the last to be seized to satisfy the paramount lien.

Hence, to call into existence the equity appealed to by

complainant, it must appear that the junior vendee had notice of the paramount lien and of the prior conveyance.

Startey vs. *Stocks*, 1 Dev., (N. C.), Eq. 314;
Lock vs. *Fulford*, 52 Ill., 166;
Iglehart vs. *Crane*, 42 Ill., 261, 266;
Brown vs. *Simmons*, 44 N. H., 478, 479, 480, 481, 482;
Chase vs. *Woodbury*, 6 Cush., 147;
Ins. Co. vs. *Bell*, 22 Barb., (N. Y.), 56, 57, 63;
Green vs. *Ramage*, 18 Ohio, (Griswold), 428;
Reilly vs. *Mayer*, 1 Beasley, 56, 57, 58, 59, 60;
Mechanic's Association vs. *Conover*, 1 McCarter, 225;
Orvis vs. *Newell*, 17 Conn., 100.

From the authorities cited it will be seen how thoroughly established is the rule requiring notice to the junior purchaser of the earlier conveyance of part of the mortgaged property. Indeed, to hold that a purchaser of real estate is to be prejudiced by a mere equity, not known to him from the land records nor from any other source, would be entirely opposed to the spirit of our registry laws.

Does complainant show that appellant had actual knowledge or constructive notiee, when the deed to secure it was taken, that there was a paramount lien and that a portion of the property bound by it had been previously conveyed by Brown?

The record nowhere shows even a pretense, on the part of complainant, that appellant had actual knowledge of such prior conveyance or of the paramount lien.

Neither does it anywhere appear that appellant had constructive notice of the prior conveyance of the encumbered property.

The bill of complaint contains no allegation that the deed from Brown to secure the loan made by the Freedmen's Savings and Trust Company was ever recorded.

However the truth may be, evidence to establish the fact of record would not be admissible, since the proofs must be confined to the allegations.

Simms vs. *Guthrie*, 9 Cranch, 25;
Boone vs. *Chiles*, 10 Peters, 209.

It is true that the original deed is filed as an exhibit with the bill of complaint, but it is not, for that reason, a part of the bill, nor can its contents be treated as a portion of the averments of the bill.

Terry vs. *Jones*, 44 Miss., 542;
Strathan vs. *Ins. Co.*, 45 Miss., 600;
Caton vs. *Willis*, 5 Iredell Eq., 335.

Even if it were competent to refer to this deed for the purpose of supplying allegations which are wanting in the bill itself, there is nothing on the face of the deed to indicate that it has ever been recorded, much less that it was of record when appellant loaned its money on the faith of Brown's title to the land taken as security.

"The title of a *bona fide* purchaser for valuable considerations is not to be affected by loose, vague and uncertain evidence of the existence of the prior title. If a former owner neglects to record his title, every presumption is to be made in favor of a subsequent purchaser."

Boggs vs. *Varner*, 6 W. & S., 469.

But it is maintained that, even if that deed had been recorded, appellant would not thereby be charged with constructive notice.

The record does not show that Brown acquired title to the lots subsequently owned by complainant by the same deed or conveyance as those subsequently conveyed to secure appellant.

So far as the record shows, the parcels of ground came to Brown by different chains of title. But appellant is not

charged with constructive notice of any conveyance by Brown, unless it be in the chain of its title.

Green vs. *Ramage*, 18 Ohio (Griswold), 429;
Boggs vs. *Varner*, 6 Watts. & S., 469;
Guion vs. *Knapp*, 6 Paige, Ch. 42;
Chase vs. *Woodbury*, 6 Cush., 143;
Hamilton vs. *Royse*, 2 Sch. & Lef., 326.

B.

Those courts which favor the rule that charges the lien on the several parcels of land in the inverse order of their alienation, rest their argument on the fact that the purchaser has paid *full* consideration for the title, and has received a general warranty deed.

Bradley vs. *George*, 2 Allen, 392;
Wallace vs. *Stevens*, 64 Maine, 225.

But a beneficiary, under a deed of trust, does not occupy this position, for he does not pretend to pay a full price for the property, and the trustees only receive a conveyance of the grantors then interest in the land. Such a deed could only operate by way of estoppel against the grantor. It does not profess to pass an absolutely perfect title, and for full value. In such cases the *pro rata* rule has been held to apply, even if, in the same jurisdiction, the opposite rule would hold in cases of warranty deeds.

Ely vs. *Perrine*, 2 N. J. Eq. (1 Green.,) 396;
Pancoast vs. *Duval*, 26 N. J. Eq., 445.

Now, he who seeks to enforce an equitable right, especially if he appeals to the Chancellor to grant him a mere benevolence (see 2 Johns.' Ch., 419, *Orvis* vs. *Newell*, 17 Conn., 100), must show affirmatively, in his bill, all the facts necessary to make out his foundation to relief (see cases *supra*, and *Tomlinson* vs. *McKaig*, 5 Gill., 276; *Ridyway*

vs. *Toram*, 2 Md. Ch., Dec., 308,) and must show affirmatively that it would be equitable, in relation to all the parties, to afford him the relief asked.

Dorr vs. *Shaw*, 4 Johns.' Ch., 17;
Sterling vs. *Brightbill*, 5 Watts., 229, 231, 232, 233.

If the equities of the case are considered, complainant is not entitled to the relief which he seeks.

We have seen that complainant has not brought himself fully within the rule on which he relies.

Appellant states, in its answer, that it had no actual notice of the paramount judgment lien.

Both complainant and appellant are charged with constructive notice of the judgment lien, if either is. In this respect their claims are equally meritorious, for each purchased under a misapprehension of facts. The contracts were of the same character and for the same purpose, and appellant had no notice of the conveyance now set up by complainant.

But when the bill was filed in this cause, appellant had already seized, by an execution issued on the paramount judgment, a portion of the property now claimed by complainant.

Now, where the equities are balanced, the legal course of an execution is not to be disturbed; *Miller* vs. *Jacobs*, 3 Watts, 437; it being well settled that where parties have an equal claim to the consideration of the Chancellor, the law will be allowed to take its course.

Miller vs. *Jacobs*, *supra*;
Zeigler vs. *Louk*, 2 Watts, 206;
Erbs' Appeal, 2 Pearson & Watts, 296;
McGinnis' Appeal, 4 Harris, 445;
Wallace's Estate, 9 P. F. Smith, 401;
Withers vs. *Carter*, 4 Grattan, 407.

Inasmuch, therefore, as complainant has not alleged nor established the necessary jurisdictional facts; nor brought himself within the equitable rule of which he claims the benefit; nor established any equity which is so far superior to appellant's as to justify the Court in interfering with a legal execution—it is submitted that the Bill of Complaint should be dismissed.

III.

The record shows that, at the time of bill filed, complainant was the owner of lots 41, 60, 61, 66 and 67; (Record, p. 3); and that the defendants, John B. Bloss, Maria Robbins, Charles P. Pushaw, James F. Medway and E. N. Houghton were the owners of the other lots seized on execution.

Notwithstanding that the persons last named were parties to the record as defendants, and though they filed no cross-bill, the court granted the injunction as to the lots owned by them.

It is submitted that, even if the court below had the power to grant to complainant any portion of the relief prayed, it erred in the extent of that relief, for complainant shows no title to the lots conveyed to defendant before bill filed and defendants ask no relief whatever.

HANNA & JOHNSTON,

Sol'rs for Appellant, the Nat'l Savings Bank.

IN THE

Supreme Court of the United States.

No. 161.—October Term, 1879.

National Savings Bank of the District of Columbia,
Appellant,

vs.

John A. J. Creswell et al., Commissioners of the F. S. & Trust Co., Appellees.

BRIEF FOR APPELLEES.

ENOCH TOTTEN,
For Appellees.

J. L. Pearson, Printer, 9th and D sts., Washington.

IN THE

Supreme Court of the United States,

No. 161.—October Term, 1879.

National Savings Bank of the District of Columbia, Appellant,

vs.

John A. J. Creswell et al., Commissioners of the F. S. & Trust Co., Appellees.

BRIEF FOR APPELLEES.

The bill in this cause was exhibited in the Supreme Court of the District of Columbia on the 21st day of August, 1874, praying an injunction to restrain the appellant, the National Savings Bank, from causing a sale of the property mentioned in the proceedings to be made by virtue of a writ of *fieri facias* issued upon a certain judgment at law. The cause was heard in the court below upon the pleadings, exhibits, and a stipulation of counsel (12). At the special term, the injunction was granted as prayed, and upon appeal to the general term of the court below, the decree was affirmed.

From this decree the National Savings Bank appealed to this court.

From the pleadings and exhibits in the cause the following facts appear, to wit:

Samuel P. Brown being seized in fee of many lots of ground in the District of Columbia, being a subdivision of a tract of land now called Mt. Pleasant, on the 3d day of March, 1870, a judgment at law was rendered and entered of record against him and Austin P. Brown, comprising the firm of S. P. Brown & Son, in favor of one Jolly, for the sum of $4,694.05.

On the 20th day of June, 1870, the firm of S. P. Brown & Son borrowed from the Freedman's Savings and Trust Company the sum of $10,000.00, for which amount they gave their promissory note payable in twelve months after its date, with interest at ten per centum per annum. To secure the payment of this indebtedness S. P. Brown executed and delivered a deed of trust, whereby he conveyed the lots described in the bill to Daniel L. Eaton, with the usual power of sale in case of default in the payment of the note. The trust deed was duly recorded on the 27th day of June, 1870. But by a clerical error the note of record endorsed on the trust deed does not appear on the printed record in this cause (6).

Several months afterwards, the appellant, the National Savings Bank, made several loans to the firm, and to secure them took several deeds of trust from said S. P. Brown, with like powers of sale, on many lots of ground, in the said District. These various trust deeds bear date, and secure the amounts, respectively, as follows (8):

Deed	dated	July 26th,	1871,	for	loan of.....	$3,700.00
"	"	" 24th,	"	"	"	
"	"	Aug. 7th,	"	"	"	3,700.00
"	"	Sept. 25th,	"	"	"	7,000.00
"	"	Mar. 11th,	1872	"	"	5,000.00
"	"	April 23d,	"	"	"	2,500.00
"	"	" 24th,	"	"	"	3,700.00

All the lots transferred by Brown, for the security of the Trust Company, and also of the Savings Bank were subdivi-

sion-lots of the same tract, to wit, a tract called Mt. Pleasant, near the Columbian College, in this District. Default having been made in the payment of the note for $10,000.00, the Freedman's Savings and Trust Company procured the lots mentioned in the bill to be sold under the power in the trust deed, and became the purchaser at the sale, and subsequently sold some of the lots to the several defendants who were made parties to this suit by the amended bill. But to save these purchasers harmless from the lien of the Jolly judgment, the Trust Company gave to each of such purchasers an indemnifying bond (2).

The defendants in the suit of Jolly sued out a writ of error in the cause, but the judgment was finally affirmed by this court. Soon after the mandate was returned to the court below, and about the 16th day of July, 1874, the National Savings Bank, the appellant, purchased the judgment from Jolly and procured it to be assigned to that corporation on the docket (2); thereupon a writ of *fieri facias* was, by the Savings Bank, sued out on the judgment and placed in the marshal's hands, and he proceeded to levy upon the lots of the Trust Company mentioned in the bill. To restrain the sale threatened by the marshal upon this levy the bill was filed.

The question arising in the case is, whether or not this judgment now owned and held by the National Savings Bank, the appellant, can be collected out of the property conveyed to the Freedman's Savings and Trust Company, until all the other property bound by the judgment and owned by Brown at the date of the sale to the Trust Company, shall have been first sold and the proceeds applied to the payment of the judgment.

The lots bound by this judgment and subsequently mortgaged or sold by Brown at different times to different persons, are chargeable with the burthen of the judgment in the inverse order of their alienation; that is to say, the parcels last sold are to be charged to their full value and then go backwards until the judgment shall have been fully paid.

This is the doctrine now fully established in this country. It was firmly settled in New York in the case of Clowes vs. Dickinson, 5 John. Ch., 285; S. C. (on appeal), 9 Cowen, 403. See, also, Gill vs. Lyon, 1 John. Ch., 447; Sturtevant vs. Hall, 2 Barb. Ch., 151.

The doctrine established in Clowes vs. Dickinson has been followed in nearly all the states in the Union, where the question has come up.—(Shannon vs. Marselis, Saxton, (N. J.,) 413; Shepherd vs. Adams, 32 Me., 63; Holden vs. Pike, 24 Me., 427; Cushing vs. Ayre, 25 Me., 383; Com. Bank vs. Western Res. Bank, 11 Ohio, 444; Cummings vs. Cummings, 3 Kelly (Ga.), 460; Pallen vs. Agricultural Bank, 1 Freeman (Miss.), 419; S. C. (affirmed on appeal), 8 S. & M., 357; Gist vs. Pressley, 2 Hill Ch. (S. Carolina), 318; Stoney vs. Shultz, 1 Hill Ch., 500; Bank vs. Howard, 1 Strobhart Eq. R., 173; Wright vs. Atkinson, 3 Sneed (Tenn.), 585; Conrad vs. Harrison, 3 Leigh, 532; Lyman vs. Lyman, 32 Vt., 79. See, also, 2 Leading Cases in Eq. (Am. notes), 237; Cary vs. Folsom, 14 Ohio, 365; Gates vs. Adams, 24 Vt., 70; Watson vs. Barr, 7 Md., 117; Hamilton vs Schwehr, 34 Md., 107; Titus vs. State. 17 Wis., 248; Wynn vs. Carter, 20 Wis., 107; Hurd vs. Eaton, 22 Ill., 122; 98 U. S., 176.) For a list of cases and remarks on this doctrine see Leading Cases in Eq., (1877,) vol. 2, pt. 1, p. 291.

Mr. Justice Story, in his learned work on Equity Jurisprudence, inclines to doubt the justice of the doctrine as established in America, and seems to prefer the doctrine which charges the original incumbrance ratably upon the land of subsequent purchasers. He says the doctrine has been so "asserted in the ancient as well as the modern English cases on the subject."—(2 Story's Eq., § 1,233, b.) He cites the case of Averall vs. Wade, 1 Lloyd & Goold R., 252, (11 Eng. Ch. R.,) as one of the authorities sustaining this view. Upon an examination of that case it will be found that it sanctions the American rule as above laid down. The case of Hamilton vs. Royse, 2 Schoales & Lefroy, 315, is to the same effect.—(See Cowden's Estate, 1 Penn. St. R., 267.)

It is well settled, as a rule of equity, that when an individual, owning two or more pieces of land bound by a personal judgment against him, sells a part of them, that the land retained by him shall be primarily chargeable with the debt.—(2 Story's Eq., 1,233, b.) This rule is clearly right and just. On his alienation of a part the remainder becomes immediately burthened with the *entire debt.* The vendor cannot escape from the rule, and enforce contribution against his vendee in order to pay the judgment. This is conceded in all the cases. How then can he sell to a third person a privilege or right which he himself does not possess? The second purchaser "sits in the seat of his vendor," and has precisely the same rights.—(Clowes vs. Dickinson.) The record of the judgment was notice to the world, and every purchaser or mortgagee was bound to ascertain what lands the judgment debtor had alienated subsequently to the rendition of the judgment. Every conveyance of land, bound by this judgment lien, made by Brown, directly and materially affected the title to the lots remaining in his possession, by releasing, at least equitably, the parcels so conveyed from the lien of the judgment, and transferring a corresponding additional burthen to such remaining parcels.

This was a deed of trust, the equivalent of a mortgage, and every mortgagee was bound to take notice of its record and the record of the judgment.—(Lyman vs. Lyman, 32 Vt., 81.)

A judgment of the Supreme Court of the District of Columbia is notice from the day of its rendition.—(Tayloe vs. Thompson, 5 P., 368.)

ENOCH TOTTEN,
For Appellees.